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THE OLDER MODES OF TRIAL.

WHEN the Normans came into England they brought with them, not only a far more vigorous and searching kingly power than had been known there, but also a certain product of the exercise of this power by the Frankish kings and the Norman dukes; namely, the use of the inquisition in public administration, *i.e.*, the practice of ascertaining facts by summoning together by public authority a number of people most likely, as being neighbors, to know and tell the truth, and calling for their answer under oath. This was the parent of the modern jury. In so far as the business of judicature was then carried on under royal authority it was simply so much public administration, and the use of the inquisition came to England as an established, although undeveloped, part of the machinery for doing all sorts of public business. With the Normans came also another novelty, the judicial duel — one of the chief methods for determining controversies in the royal courts; and it was largely the cost, danger, and unpopularity of the last of these institutions which fed the wonderful growth of the other.

The Normans brought to England much else, and found that much of what they brought was there already; for the Anglo-Saxons were their cousins of the Germanic race, and had, in a great degree, the same legal conceptions and methods, only less worked out. Looking now at these and at the Norman additions, what were the English modes of trying questions of fact when the jury came in, and how did they develop and die out? Some

slight account of these things will serve as a background in trying to make out the jury.

I. The great fundamental thing, to be noticed first of all, out of which all else grew, was the conception of popular courts and popular justice. We must read this into all the accounts of our earliest law. In these courts it was not the presiding officers, one or more, who were the judges: it was the whole company — as if in a New England town-meeting, the lineal descendant of these old Germanic moots, the people conducted the judicature, as well as the finance and politics, of the town. These old courts were a sort of "town-meeting" of judges. Among the Germanic races this had always been so; nothing among them was more ancient than this idea and practice of popular justice.[1] This notion among a rude people carried with it all else that we find, — the preservation of very old traditional methods, as if sacred; a rigid adherence to forms; the absence of the development of the rational modes of proof. Of the popular courts Maine says, in the admirable sixth chapter of his "Early Law and Custom," while speaking of the Hundred Court and the Salic Law: "I will say no more of its general characteristics than that it is intensely technical, and that it supplies in itself sufficient proof that legal technicality is a disease, not of the old age, but of the infancy of societies." The body of the judicial business of the popular courts seven and eight centuries ago lay in administering rules that a party should follow this established formula or that, and according as he bore the test should be punished or go quit. The conception of the trial was that of a proceeding between the parties, carried on publicly under forms which the community oversaw. They listened to complaints which often must follow with the minutest detail certain forms "de verbo in verbum," which must be made probable by a "fore-oath," complaint-witnesses, the exhibition of the wound, or other visible confirmation. There were many modes of trial and some range of choice for the parties; but the proof was largely "one-sided," so that the main question was who had the right to go to the proof, for this was often a privilege. For determining this question there were traditional usages and rules, and the determination was that famous *Beweisurtheil* which disposed of

[1] Maine, Early Law and Custom, c. 6; Pop. Gov., pp. 89–92; Essays in Anglo-Saxon Law, 2–3.

cases before they were tried. Since the trial was a matter of form, and the judgment was a determination what form it should take, the judgment naturally came before the trial. It determined, not only what the trial should be, but how it should be conducted and when, and what the consequence should be of this or that result.

In these trials there are various conceptions: the notion of a magical test, like the effect of the angel's spear upon the toad in Milton's lines —

> "Him thus intent Ithuriel with his spear
> Touched lightly; for no falsehood can endure
> Touch of celestial temper, but returns
> Of force to its own likeness; up he starts,
> Discovered and surprised;"

that of an appeal for the direct intervention of the divine justice (*judicium Dei*, Gottesurtheil); that of the application of a mere form, sometimes having a real and close relation to the probable truth of fact, and sometimes little or no relation to it, like a child's rigmarole in a game; that of regulating the natural appeal of mankind to a fight; that of simply abiding the appeal to chance. There was also, conspicuously and necessarily, the appeal to human testimony, given under an oath, and, perhaps, under the responsibility of fighting in support of it. But what we do not yet find, or find only in its faint germs, is any trial by a court which weighs this testimony or other evidence merely in the scale of reason, and decides a litigated question as it is decided now. That thing, so obvious and so necessary, as we are apt to think it, was only worked out after centuries.[1]

The old forms of trial (omitting documents) were chiefly these: (1) By witnesses; (2) The party's oath, with or without fellow-swearers; (3) The ordeal; (4) Battle. Of these I will speak in turn; they were companions at first of trial by jury when that mighty plant first struck its root into English soil, and some of them lived long beside it. As we shall see, while that grew and spread, all of them dwindled and died out.

II. But first something must be said of that institution of the complaint-witnesses, called also (as some other things were called) the "Secta," which has been the source of much confusion. This had a function which was a natural and almost necessary

[1] The reasons which still make it so difficult to refer international controversies to the rational mode of trial may help us to understand our older law.

feature of the formal system of proof. When the proof was "one-sided," and allotted to this man or that as having merely the duty of going through a prescribed form to gain his case, it was a very vital matter to determine which of the parties was to have it. If there was to be a trial it was a privilege, in a civil case, to go to the proof; and yet the form was often clogged with technical detail, and had little or no rational relation to the actual truth of fact involved in the charge, it might be very dangerous and burdensome to be put to the necessity of going through with it. The forms of trial might also involve bodily danger or death. Not every complaint or affirmative defence, therefore, would put an antagonist to his proof: there must be something to make it probable. This notion is fixed in the text of John's Magna Carta (art. 38) in 1215: *Nullus ballivus ponat de cetero aliquem ad legem*[1] *simplici loquela sua, sine testibus fidelibus ad hoc inductis.*[2]

This sort of "witness," it must be noticed, might have nothing to do with the trial; he belonged to the stage of the preliminary allegations, the pleading, where belonged profert of the deed upon which an action or a plea was grounded. But just as rules belonging to the doctrine of profert in modern times crept over, unobserved, into the region of proof, under the head of rules about the "best evidence" and "parol evidence," so the complaint-witnesses were, early and often, confused with proof-witnesses — a process which was made easy by the ambiguity of the words "testis," "secta," and "witness." The complaint-proof was thus confused with the old "one-sided" witness-proof, with the rational use of witnesses by the ecclesiastical courts, and with the proof by oath and oath-helper. One complaint-witness seems originally to have been enough, and in the procedure leading to the duel or the

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[1] As to this term *lex*, see 4 Harv. Law Rev. 157–8.

[2] Brunner's explanation of this passage is found in his Schwurg., 199–200. "If a lord appears with a complaint-witness against his vassal, in his own court, the vassal must answer, although no witnesses are brought. . . . Sometimes this privilege was limited so that the lord had it but once a year. The privilege of the fisc [or, as we should say, the crown] in this respect was unlimited. If a royal officer appears as plaintiff in a complaint belonging to his chief, he need not produce any witness. . . . Even if such a complaint only called for the oath of purgation from the defendant, yet for this there was need, not merely of a clear conscience, but compurgators, and the painful formalism of the oath might only too easily bring the swearer to grief. Article 38 in Magna Carta may have owed its origin to such considerations when it provided, 'Nullus ballivus,'" etc. See also Brunner in Zeitschrift der Savigny-Stiftung (Germ. Abt.), ii. 214.

grand assize one was always enough, but generally two or more were required; and as in the duel the witness might be challenged, so in other trials the defendant could stake his case on an examination of the complaint-witnesses, and if they disagreed among themselves he won. Apart from this, the complaint-witnesses need not be sworn; they might be relatives or dependents of the party for whom they appeared. As they were not necessarily examined at all, so in later times they were not even produced, and only the formula in the pleadings was kept up. In this form, as a mere expression in pleading, et inde producit sectam, the Secta (Suit) continued to live a very long life; so that within our own century we read as the third among Stephen's "principal rules of pleading," that "the declaration should, in conclusion, lay damages and allege production of suit. . . . This applies to actions of all classes. . . . Though the actual production has for many centuries fallen into disuse, the formula still remains, . . . 'and therefore he brings his suit,'" etc.[1] This formula even survived the Hilary rules of 1834.

It was the office of the secta to support the plaintiff's case, in advance of any answer from the defendant. This support might be such as to preclude any denial, as where one was taken "with the mainour" and the mainour produced in court,[2] or where the defendant's own tally or document was produced, or, as we have noticed, where a defendant chose to stake his case on the answers of the secta. Documents, tallies, the production of the mainour, the showing of the wound in mayhem, all belong under

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[1] Pleading (Tyler's ed., from the 2d Lond. ed. of 1827), 370–2.

[2] Palgrave has a lively thirteenth century illustration of this in his fiction founded on fact, "The Merchant and the Friar," 173; see also Palg. Eng. Com., ii. p. clxxxvii, pl. 21 (1221); s. c. Maitland, Pl. Crown for Gloucester, 92, pl. 394; ib. 45, pl. 174, and notes pp. 145, 150; Pike's Hist. Crime, i. 52. It is an entire misapprehension to suppose, as Stephen does, Hist. Cr. Law, i. 259, that this is a trial. The point of the matter is that trial is refused. This principle also covered cases that were not so plain; as in 1222 (Br. N. B'k, ii., case 194), in an action for detaining the plaintiff's horse which he had sent by his man to Stamford market for sale, it is charged that the defendant had thrown the man from the horse in the market, imprisoned him five days, kept the horse so that afterwards he was seen in the Earl of Warenne's harrow at Stamford, etc., *et inde producit sectam* (giving ten or eleven names). The defendant defends the taking and imprisonment and all, word for word, etc. "But because all the aforesaid witnesses testify that they saw the horse in the seisin of Richard and in the harrow of the Earl, and this was done at Stamford market," the defendant had his day for judgment. The author of the note-book has a memorandum on the margin at this case: *Nota quod ea qua manifesta sunt non indigent probacione.*

this general conception. The history of our law from the beginning of it is strewn with cases of the profert of documents. This last relic of the principle of the Saxon fore-oath and the Norman complaint-witness was not abolished in England until 1852.[1]

A few cases will illustrate what has been said about the secta. In 1202, in the King's Court, an appeal was brought for assaulting the plaintiff and wounding him with a knife in the jaw and arm, "and these wounds he showed, and this he offers to prove . . . by his body."[2] In 1226[3] William seeks to recover of Warinus twelve marks on account of a debt due from his father for cloth, *et inde producit sectam que hoc testatur.* Warinus comes and defends, and asks that William's secta be examined. This is done, and the secta confess that they know nothing of it, and moreover they do not agree (*diversi sunt in omnibus rebus*); and William has no tally or charter and exhibits nothing, and it is adjudged therefore that the defendant go quit. In 1229[4] Ada demands of Otho eleven pounds, which her father had lent him, and makes profert of a tally, and produces a secta which testifies that he owes the money. Otho denies it, and is adjudged to make his proof with eleven compurgators — *defendat se duodecima manu.* A case in 1323 draws attention to the exact effect of the complaint-proof.[5] A woman claimed dower, alleging that her husband had endowed her *assensu patris*, and put forward a deed which showed the assent. The defendant traversed; some discussion followed as to how the issue was to be tried, and as to the effect of the deed. Counsel for the defendant said, "The deed which you show effects nothing beyond entitling you to an answer." . . . Counsel for the plaintiff: "True, but . . . he can only have such issue as the deed requires."

With the gradual discrediting of party proof and the formal procedure, the secta steadily faded out. As early as 1314[6] we find counsel saying that the Court of Common Bench will not allow the secta to be examined. Ten years later,[7] a demand for

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[1] St. 15 & 16 Vic., c. 76, s. 55.

[2] Selden, Soc. Pub. i., case 87. This was good old Germanic usage. Brunner, Schw. 201. Compare LL. H. I. xciv., 5 (Thorpe, i. 608).

[3] Bracton's Note Book, iii., case 1693.

[4] Bracton's Note Book, ii., case 325.

[5] Y. B. Ed. II. 507.

[6] Y. B. Ed. II. 242.

[7] Ib. 582.

examining the secta reveals the fact that the plaintiff has none; and this defeats his claim. Finally, in 1343,[1] in an action of debt for money due, partly under a bond and partly by "contract," we read: "*Rich:* As to the obligation, we cannot deny it; as to the rest, what have you to show for the debt? *Moubray:* Good suit (secta). *Rich:* Let the suit be examined at our peril. *Moubray:* Is that your answer? *Rich:* Yes, for you furnish suit in this case of contract in lieu of proof of the action. *Moubray:* Suit is only tendered as matter of form in the count; wherefore we demand judgment. *Sh.* (*J.*):[2] It has been heard of that suit was examined in such cases, and this opinion was afterwards disproved (reprove). *Sh.* (*J.*):[2] Yes, the same Justice who examined the suit on the issue [*pur issue*] saw that he erred and condemned his own opinion. *Gayneford:* In a plea of land the tendering of suit is only for form, but in a plea which is founded on contract that requires testimony, the suit is so examinable [*tesmoinable*] that, without suit, if the matter be challenged, the [other] party is not required to answer. *Sh.* (*J.*):[2] Certainly it is not so; and therefore deliver yourselves. *Rich:* No money due him," etc.[3] The thing is evidently antiquated by this time. And yet, as we saw, it continued as a form in pleading for nearly five centuries longer.

III. *Trial by Witnesses.* — This appears to have been one of the oldest kinds of "one-sided" proof. There was no testing by cross-examination; the operative thing was the oath, and not the probative quality of what was said, or its persuasion on a judge's mind.[4] Certain transactions, like sales, had to take place before previously appointed witnesses. Those who were present at the church door when a woman was endowed, or at the execution of a charter, were produced as witnesses. It was their state-

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[1] Y. B. 17 Ed. III. 48, 14.

[2] Whether Shardelowe or Shareshull, both judges of the Common Bench, at this time, I do not know.

[3] Selden, as one would think, misconceived this matter when he said (Note 8, Fortescue de Laud., c. xxi), after citing a case of trial by witnesses, in 1234, printed for the first time in Maitland's invaluable "Bracton's Note Book" four years ago: "The proofs of both sides are called *secta*. It was either this or some like case that Shard[elowe] entended in 17 Ed. III., fol. 48 b, in John Warrein's case — speaking of a justice that examined the suit. And it appears [he adds truly] there, that under Ed. III., the tendering of suit or proofs was become only formal as at this day, like the *plegii de prosequendo*.

[4] Brunner, Schw. 54–59.

ment, sworn with all due form before the body of freemen who constituted the popular court, that ended the question. In order to show the purely formal character of this sort of proof in the period of the Frankish kings, even where counter-witnesses were allowed, Brunner refers to a capitulary of Louis le Débonnaire, of the year 819. It is added in a note. It will be observed that while he who suspects that witnesses produced against him are false may bring forward counter-witnesses, yet if the two sets differ hopelessly, the only solution of the difficulty that offers is to have witnesses from each side fight it out together.[1]

An English illustration of the old trial by witnesses of the date of 1220–1, and bearing marks of antiquity then, is found in the Liber Albus,[2] where, before Hubert de Burgh and his associate justices, the citizens of London answer as to the way in which certain rents may be recovered in London, viz., by writ of "Gaverlet," in which, if the tenants deny the *servitium*, the claimant shall name *sectam suam, scilicet duos testes*, who are to be enrolled and produced at the next hustings. "And if on this day he produce the witnesses and it is shown by them *ut de visu suo et auditu*, . . . the complainant shall recover his land in demesne." This is also incorporated in the "Statute of 'Gavelet,'" of 10 Edward II. (1316).

But even earlier than this, here, as also in Normandy,[3] the old mere party proof by witnesses had, in the main, gone by. Things indicate the breaking up and confusing of older forms; anomalies and mixed methods present themselves. The separate notions of the complaint secta, the fellow swearers, the business witnesses, the community witnesses, and the jurors of the inquisition and the assize run together. It is very interesting to find that, as the

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[1] Si quis cum altero de qualibet causa contentionem habuerit, et testes contra eum per judicium producti fuerint, si ille falsos eos esse suspicatur, liceat ei alios testes, quos meliores potuerit, contra eos opponere, ut veracium testimonio falsorum testium perversitas superetur. Quod si ambæ partes testium ita inter se dissenserint, ut nulla tenus una pars alteri cedere velit, eligantur duo ex ipsis, id est, ex utraque parte unus, qui cum scutis et fustibus in campo decertent utra pars falsitatem, utra veritatem suo testimonio sequatur. Et campioni qui victus fuerit, propter perjurium quod ante pugnam commisit, dextera manus amputetur. Cæteri vero ejusdem partis testes, quia falsi apparuerint, manus suas redimant; cujus compositionis duæ partes ei contra quem testati sunt dentur, tertia pro fredo solvatur. — (Capitulare Primum Ludovici Pii, A. D. 819. — *Baluze*, Capitularia Regum Francorum, I. 601.)

[2] Mun. Gild. Lond. i. 62.

[3] Brunner, Schw. 189.

Norman law contemporaneous with our earliest judicial records shows the same breaking up and confusion as regards this sort of trial which we remark in England, so it is the same classes of cases in both countries that preserve the plainest traces of it. "In my opinion," says Brunner,[1] "undoubtedly we are to include under the head of the formal witness-proof these: (1) The proof of age; (2) The proof of death; . . . (3) The proof of property in a movable chattel."

(*a.*) *Age.* — In a case of 1219, in the Common Bench,[2] where the defendant alleged the minority of the plaintiff, the plaintiff replied that he was of full age, and thereof he put himself on the inspection of the judges, and if they should doubt about it he would prove it either by his mother and his relatives, or otherwise, as the court should adjudge. The judges were in doubt, and ordered that he prove his age by twelve legal men, and that he come with his proof "on the morrow of souls."[3] Now these twelve are not at all a "jury," for the party selects them himself. At the page of Bracton's treatise where he cites this case, he tells us that in these cases the proof "is by twelve legal men, or more if there be need, some of whom are of the family . . . and some of whom are not;" and he gives the form of oath, which is a very different one from that of the jury. First, one of them swears that the party is or is not twenty-one if a man, or fourteen or fifteen if a woman — *sic me Deus adjuvet et sancta Dei evangelia;* and then in turn each of the others swears that the oath thus taken is true.

In a peculiarly interesting part of his great work on the jury, Brunner points out that the old witness-proof was in some cases transformed at the hands of the royal power into an inquisition, so that the witnesses were selected by the public authority, as they were in the ordinary jury. We seem to see this way of blending things in the English process, *de ætate probanda.* In 1397[4] we read, after the statement that the king's tenants, on coming of age, in order to recover their lands must sue out a writ of ætate probanda, that those who serve on the inquest must be at least forty-two years old, "and shall tell signs to prove

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[1] Schw. 205.

[2] Bracton's Note Book, ii., case 46; cited in Bracton, f. 424 b.

[3] See also ib. iii., case 1131 (A. D. 1234), and case 1362 (in 1220).

[4] Bellewe, 237.

the time of the birth, as that the same year there was a great thunder, tempest, or pestilence, and the like; and all these signs shall be returned by the sheriff." And the reporter puts it as a query whether, since this is proof by witnesses (*per proves*), there may be less than twelve. The requiring of the age of forty-two points to the idea that they must have been of an age to be a witness when the child was born. By 1515 [1] this doubt seems to have been settled: "It was agreed that the trial of his age shall be by twelve jurors; but in giving their verdict every juror should show the reason inducing his knowledge of the age, such as being *son gossipe*, or that he had a son or daughter of the same age, or by reason of an earthquake or a battle near the time of the birth, and the like." Quaint illustrations of these examinations, of the year 1409, are found in the Liber de Antiquis Legibus.[2] In one of these cases, relating to a woman's age, each of the twelve makes his statement separately, and each is asked how he knows it. One, sixty years old, says that he fixes the age by the fact that he saw the child baptized; they had a new font, and she was the first person baptized from it. Another, a tailor of the same age, says that he held a candle in the church on the day of baptism, and also made the clothes which the mother wore at her purification. Two others, over fifty, fix the day by a great rain and flood which made the river overflow, and filled the hay with sand. Two others recollect that their hay from six acres of meadow was carried away by the flood. Two others remember it by a fire that burned a neighbor's house. Another by the fact that he was the steward of the child's grandfather, and was ordered by him to give the nurse who told him the news twenty shillings; and so on. It is easy, then, to see how in this sort of case the old proof by witnesses should gradually fade out into trial by jury; for the old jury was nothing but a set of triers made up of community witnesses selected by the king's authority. The old mode of trying age by the inspection of the judges, which we saw in 1219, was practised long; but the general rule became established in all such cases that the judges, if in doubt, might refer the matter to a jury.[3]

(*b.*) *Ownership of Chattels.* — There were other sorts of trans-

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[1] Keilwey, 176–7.

[2] pp. cxlix–cliii., Camden Soc. Pub., London (1846).

[3] Brooke's Ab. Trial. 60.

formation. We have seen [1] how the old law could admit counter-witnesses without destroying the formal nature of the proof. With the refinement of procedure, affirmative defences came to be more distinctly recognized; each party had to produce a complaint secta. There grew up the practice (whether by consent of parties or otherwise) of examining these, and disposing of the case according as one secta was larger or more numerous than the other, or composed of more worthy persons; and, again, if it was impossible to settle it on such grounds, of going to the jury. The secta in such cases turned into proof-witnesses. It was such a class of cases that brought down into our own century the *name* of "trial by witnesses," and the fact of a common-law mode of trial which had not sunk into the general gulf of trial by jury.

In 1234–5 [2] there came up to the king's court a record of proceedings in the hundred court of a manor of the Bishop of Salisbury. A mare had been picked up in the manor, and one William claimed her in the hundred court and took her, on producing a sufficient secta and giving pledges to produce the mare and abide the court's order for a year and a day, according to the custom of the manor. One Wakelin de Stoke then appeared as claimant, and the steward required each to come on a day with his secta. They came *et Wakelinus producit sectam quod sua est et similiter Wilhelmus venit cum secta sua dicens quod sua fuit et ei pullanata* (*i.e.*, foaled). The hundred court, finding itself puzzled and not knowing *cui incumbebat probacio*, postponed judgment *pro afforciamento habendo* (*i.e.*, *semble*, in order that the parties might increase their sectas). Then Wakelin appeared with a writ removing the case to the king's court at Westminster. At Westminster William produced his secta, and they differed *in multis, et in tempore et in aliis circumstanciis*, some of them saying that William bought the mother of the mare four years ago, and she was then pregnant with her and had a small white star on her forehead; and some that it was six years ago and she had n't any star; and some agreeing in the time but differing about the mark, — some of them saying she had no star, but only some white hairs on her forehead, and some that she had n't any star at all. Wakelin produced a secta that wholly agreed, all saying that on such a day, four years back, Wakelin came and bought a sorrel (*soram*) mare with a

[1] *Ante*, p. 52.

[2] Bracton's Note Book, iii., case 1115.

sucking colt, and gave the colt to one John to keep. They were questioned about marks, and entirely agreed in saying that the colt had the left ear slit and the tail partly cut off, and that she was black. A view was taken of the colt, and she was not more than four years old at most, or three years and a half at least. Then an official of the manor, Thomas de Perham, said that Wakelin, before he saw the mare in question, told her color and all the marks by which she could be identified, and that William, when he was questioned, did n't know her age, and said nothing distinct, except that she was foaled to him. The case, however, went down again for judgment, because the Bishop of Salisbury claimed his jurisdiction; *et quia secta quam Wilhelmus producit non est sufficiens nec aliquid probat et quia loquela incepta fuit infra libertatem episcopi . . . concessa est ei et teneat unicuique justiciam.*[1]

(*c.*) *Death.* — But the typical sort of case, and the longest-lived, is what Selden instances in the note just cited when he says: "But some trials by our law have also witnesses without a jury; as of the life and death of the husband in dower and in *cui in vita.* This continued in England until the end of the year 1834. A case or two will illustrate this proceeding.

In 1308[2] Alice brought a *cui in vita*, and Thibaud, the tenant, answered that the husband was living. The woman offered proof that he was dead (hanged at Stamford); the tenant the same that he was alive, *issint que celui que mend provereit mend avereit.* "Alice came and proved her husband's death by four *juretz*, who agreed in everything; and because Thibaud's proof was *mellour et greyneure* than the woman's proof, it was adjudged that she take nothing by her writ." In Fitzherbert (Trial 46), what seems to be the same case is briefly referred to, and there we read that they were at issue *issint cesti que mieulx prove mieulx av.*; and the tenant proves by sixteen men, etc., and the demandant by twelve; and because the tenant's proof "*fuit greindr* than the demandant's, it was awarded," etc. If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other, and left a total of four to the credit of the tenant, a

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[1] For the theory of such cases see Brunner, Schw. 431. Selden (note 8 to Fortescue de Laud., c. 21) says: "It was either this or some like case that Shard intended in 17 Ed. 3, 48 b, in John Warrein's case, speaking of a justice that examined the suit." This may well be doubted.

[2] Y. B. Ed. II. 24.

result which left his proof the better.[1] This old catch of *qui mieulx prove mieulx av.*, a pretty certain badge of antiquity, appears again sixty years later. A woman brought an appeal for her husband's death. The defendant said he was alive. The parties were directed to bring their witnesses, *et celui qui meuch prova meuch av.*[2] In 1560, in the interesting case of Thorne *v.* Rolff,[3] we have an instance where, in dower, issue was taken on the death or life, and the parties were called on to inform the court "*per proves*, [*i.e.*, witnesses] *ut oportet.*" The demandant brought two, "who were sworn and examined by Leonarde, second prothonotary." These statements are entered in full on the record, which is all given in Benloe's report. The two statements occupy about a page of the folio. Then it is recorded that the tenant produced no witnesses, and the court admits what is offered, as *bonam, probabilem et veram probationem*, and gives judgment for the demandant. Dyer connects this with the old law by citing Bracton, 302, where he speaks of deciding in such cases according to the *probatio magis valida.* The number, rank, and position of the witnesses are what Bracton alludes to. But it is probable that by the time of Thorne *v.* Rolff the rational method of conducting the "trial by witnesses" had taken place; for Coke, half a century later,[4] in enumerating "divers manners of trials," designates this as "trial *by the justices* upon proofs made before them;" and so Comyns, a hundred years afterwards.[5] Blackstone, however, later in the last century,[6] and Stephen,[7] pour back again this new wine into the old bottles and call this wholly modern thing by the old name of "trial by witnesses." Blackstone's explanation of it shows little knowledge of its history. And at last this venerable and transformed relic of the Middle Ages was abolished in England, when real actions came to an end by the statute of 1833.

IV. *Trial by Oath.* — As the Anglo-Saxons required from a

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[1] Dyer, 185 a, pl. 65, quotes this case as showing four witnesses for the woman and twelve for the tenant.

[2] Lib. Ass. 273, 26; Brooke, Ab., Trial, 90, makes the phrase read *cesty qui nient provera nient avera.*

[3] Dyer, 185 a, ed. 1601; s. c. Old Benloe, 86.

[4] Case of the Abbot of Strata Mercella, 9 Co. 30 b.

[5] Digest, Trial (B).

[6] Com. iii., c. 22.

[7] Pleading, Tyler's ed. (from the 2d Eng. ed., 1827), 114, 131.

plaintiff the taking of a fore-oath, so the defendant was allowed sometimes to clear himself merely by his own oath. But the great mediæval form of trial by oath was where the party swore with the auxiliary oath of others — compurgation. In the Salic law, that "manual of law and legal procedure for the use of the free judges in the oldest and most nearly universal of the organized Teutonic courts, the court of the hundred,"[1] in the fifth century, we find it.[2] It continued among the Germanic people in full force. These fellow-swearers were not witnesses; they swore merely to the truthfulness of another person's oath, or, as it was refined afterwards, to their belief of its truth. It was not requisite that they should have their own knowledge of the facts. Although constantly called by the ambiguous name *testis*, they were not witnesses. They might be, and perhaps originally should be, the kinsmen of the party.[3]

In our own early books this was a great and famous "trial," and its long survival has made it much more familiar to the modern English student than some of its mediæval companions. It was the chief trial in the popular courts, and as regards personal actions, in the king's courts, where, in real actions also, it was resorted to in incidental questions.[4] In the towns it was a great favorite. An early and quaint illustration of it is found in the Custumal of Ipswich, drawn up about the year 1201 by way of preserving the old usages of the town, and again compiled a hundred years later because of the loss of the older copy.[5] In debt between citizens of the town, the party who had to prove his case was to bring in ten men; five were set on one side and five on the other, and a knife was tossed up in the space between them. The five towards whom the handle lay were then set aside; from the other

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[1] Maine, Early Law and Custom, 144.

[2] Hessels & Kern col. 208, xxxvii; and see ib., Extravagantia, B, p. 421; Lea, Sup. and Force, 3d ed., 40, 48.

[3] Lea, Sup. and Force, 3d ed., 35. Mr. Lea's excellent book is full of instruction.

[4] Palgrave, Eng. Com. i. 262–3. For its extensive use in the manor courts, see Selden Soc. Publications, vols. ii. and iv. The highly formal character which it sometimes took on, and the perils which attended it, are illustrated in a passage from an unpublished treatise of the fourteenth century, preserved by Professor Maitland in vol. iv. p. 17. All comes to naught if the principal withdraws his hand from the book while swearing, "or does not say the words in full as they are charged against him. . . . If a defendant fails to make his law he has to pay whatever the plaintiff has thought fit to demand." We are told (Lea, Sup. and Force, 3d ed., 72) that in the city of Lille, down to the year 1351, the position of every finger was determined by law, and the slightest error lost the suit irrevocably.

[5] Black Book of the Admiralty, ii. 170–173.

five one was removed, and the remaining four took the oath as compurgators.

In criminal cases in the king's courts, compurgation is thought to have disappeared in consequence of what has been called "the implied prohibition" of the Assize of Clarendon, in 1166. But it remained long in the local and in the ecclesiastical courts. Palgrave [1] preserves as the latest instances of compurgation in criminal cases that can be traced, some cases as late as 1440–1, in the Hundred Court of Winchelsea in Sussex. They are cases of felony, and the compurgation is with thirty-six neighbors. They show a mingling of the old and the new procedure. On April 4, 1435, Agnes Archer was indicted by twelve men, sworn before the mayor and coroner to inquire as to the death of Alice Colynbourgh. Alice *adducta fuit in pleno hundredo . . . modo felonico, nuda capite et pedibus, discincta, et manibus deligatis; tendens manum suam dexteram altam, per communem clericum arreinata fuit in his verbis* (and then follows in English a colloquy): "Agnes Archer, is that thy name? which answered, yes. . . . Thou art endyted that thou . . . felonly morderiste her with a knyff fyve tymes in the throte stekyng, throwe the wheche stekyng the saide Alys is deed. . . . I am not guilty of thoo dedys, ne noon of hem, God help me so. . . . How wylte thou acquite the? . . . By God and by my neighbours of this town." And she was to acquit herself by thirty-six compurgators to come from the vill of Winchelsea, chosen by herself.

The privilege of defending one's self in this way in pleas of the crown was jealously valued by the towns. London had it in its charters. In the fifty Anglo-Saxon words of the first short charter granted by the Conqueror, and still "preserved with great care in an oaken box amongst the archives of the city," [2] there is nothing specific upon this. But in the charter of Henry I., s. 6, the right of a citizen is secured in pleas of the crown, to purge himself by the usual oath; and this is repeated over and over again in charters of succeeding kings.[3] Henry III., in his ninth charter, cut down the right, by disallowing a former privilege of the accused to supply the place of a deceased compurgator by swearing upon his grave.[4]

[1] Com. ii., p. cxvi, note; compare ib. i. 217.

[2] Norton's London, 324, note.

[3] Of Henry II., Richard, John, Henry III., the three Edwards, and Richard II. For the charters, see Liber Albus, Mun. Gild. Lond. i. 128 *et seq.*

[4] Lib. Alb., Mun. Gild. Lond. i. 137–8; Riley's ed., 123, note.

There was the "Great Law," in which the accused swore with thirty-six freemen (six times, each time with six), chosen, half from the freemen of the east side of the rivulet of Walbrook, and half from the west; they were not to be chosen by the accused himself, nor to be his kinsmen or bound to him by the tie of marriage or any other. The accused might object to them for reasonable cause; they were chosen and *struck*, much after the way of a modern special jury. The "Middle Law" and "Third Law" were like this, but had eighteen and six compurgators respectively.[1] In civil cases of debt and trespass, compurgation with six others was the rule in London; or, if the defendant was not a resident, with only two others. If he had not two, then the foreigner was to be taken by a sergeant of the court to the six churches nearest.[2]

In the king's courts the earliest judicial records have many cases of this mode of trial; *e.g.*, in 1202, in the Bedfordshire eyre, where, in an action for selling beer by a false measure, the defendant was ordered to defend herself "twelve-handed," *i.e.*, by her oath, with eleven compurgators; and she gave pledges to make her "law" (vadiavit legem).[3]

From being a favored mode of trial, wager of law steadily tended to become a thing exceptional, not going beyond the line of the precedents, and within that line a mere privilege, an optional trial alongside of the growing and now usual trial by jury. In the newer forms of action it was not allowed, and finally it survived mainly in detinue and debt.[4] Yet within a narrow range it held a firm place. In 1440,[5] in debt for board, Yelverton, for plaintiff, tried to maintain that the defendant could not have his law of a thing "which lies in the conusance of the pais." But the court held otherwise and the defendant had his law. In 1454–5,[6] there was a great debate among the judges over a demurrer to a plea of non

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1 Liber Albus, Mun. Gild. Lond. i., pp. 57–59, 92, 104.

2 A good Anglo-Saxon method. Fleta, Lib. 2, c. 63, s. 12, gives the merchants' way of proving a tally by his own oath in nine churches. He was to swear to the same thing in each, and then return to Guildhall for judgment.

3 Seld. Soc. Pub. i., case 61; s. c. Palg. Com. ii., p. cxix, note. And so elsewhere abundantly, in the earliest records. *E.g.* in 1198–9, Rot. Cur. Reg. i. 200. And see Glanville, Bk. 1, cc. 9 and 16 (1187).

4 Steph. Pl. (Tyler's ed.) 131–2.

5 Y. B. 19 H. VI. 10, 25.

6 Y. B. 33 H. VI. 7, 23.

summons in a real action, with "ready to aver per pais." It was insisted by Prisot (C. J.) that this lay in the knowledge of the pais, and that all such things should in reason be triable by the jury. He admitted, however, that the practice had been otherwise. His associates, Danvers and Danby, agreed with him; while Moyle and Ayshton pressed strongly the more conservative doctrine. "This will be a strong thing," said Moile; "it has not been done before." "Since waging law," said Ayshton, "has always been practised, and no other way, this proves, in a way, that it is *un positive ley*. All our law is directed (*guide*) by usage or statute; it has been used that no one wages his law in trespass, and the contrary in debt; so that we should adjudge according to the use," etc. No decision in the case is reported. But Brooke, in his Abridgment, in the next century, gives the latter view as *optima opinio*.

By 1587[1] compurgation seems not merely to have been unusual, but to have had an archaic look, — in the eyes, at any rate, of the Chancellor. We read that the Star Chamber refused to deal with one who was alleged to have sworn falsely in making his law; "the reason was because it was as strong as a trial. And the Lord Chancellor demanded of the judges if he were discharged of the debt by waging of his law; and they answered, 'yea.' But Manwood (C. B.) said that it was the folly of the plaintiff, because that he may change his action into an action of the case upon an assumpsit, wherein the defendant cannot wage his law." In his report of Slade's Case (1602) Coke remarks[2] that courts will not admit a man to wage his law without good admonition and due examination.

A century later it still keeps its place, but is strange and antiquated, and the lawyers and judges have lost the clue. In 1699, in the Company of Glaziers Case,[3] in a debt on a by-law, the defendant had his law. When he came with his compurgators, the plaintiff's counsel urged that the court need not receive him to his oath if he were swearing falsely or rashly; "sed, per Holt, C. J., 'We can admonish him, but if he will stand by his law, we cannot hinder it, seeing it is a method the law allows.'" The reporter takes the pains to describe the details of the proceeding,

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[1] Goldsborough, 51, pl. 13.

[2] 4 Rep. p. 95.

[3] Anon., 2 Salk. 682.

as if they were unfamiliar. I give this in a note.[1] At the end of it all: "Per Northey (plaintiff's counsel), this will be a reason for extending indebitatus assumpsits further than before. Holt, C. J. We will carry them no further." In the next case where, in a similar matter two or three years later, the court refused wager of law in debt on a by-law, Holt, C. J., said that the plaintiff's counsel yielded too much in the Glaziers Case: "It was a gudgeon swallowed, and so it passed without observation." In 1701–2 came a great case,[2] where, in debt on a city by-law, for a penalty for refusing to serve as sheriff, the defendant offered to make his law with six freemen of the city, according to the custom of London. The plaintiff demurred. Much that was futile was said of wager of law. We are told by Baron Hatsell[3] that it lies only "in respect of the weakness and inconsiderableness of the plaintiff's . . . cause of demand . . . in five cases: first, in debt on simple contract, which is the common case; secondly, in debt upon an award upon a parol submission; thirdly, in an account against a receiver; . . . fourthly, in detinue; . . . fifthly, in an amerciament in a court baron or other inferior courts not of record." Holt rationalized the matter in a different way:[4] "This is the right difference, and not that which is made in the actions, viz., that it lies in one sort of action and not in another; but the true difference is when it is grounded on the defendant's wrong; . . . for if debt be brought and . . . the foundation of the action is the wrong of the defendant, wager of law will not lie." And again,[5] "The secrecy of the contract which raises the debt is the reason of the wager of law; but if the debt arise from a contract that is notorious, there shall be no wager of law."

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[1] "The defendant was set at the right corner of the bar, without the bar, and the secondary asked him if he was ready to wage his law. He answered yes; then he laid his hand upon the book, and then the plaintiff was called; and a question thereupon arose whether the plaintiff was demandable? And a diversity taken where he perfects his law instanter, and where a day is given in the same term, and when in another term. As to the last, they held he was demandable, whether the day given was in the same term or another. Then the court admonished him, and also his compurgators, which they regarded not so much as to desist from it; accordingly, the defendant was sworn, that he owed not the money modoet forma, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over, and each held up his right hand, and then laid their hands upon the book and swore, that they believed what the defendant swore was true."

[2] London *v.* Wood, 12 Mod. 669.

[3] Ib., p. 669–70.

[4] Ib., p. 677.

[5] Ib., p. 679.

In the latter half of the eighteenth century it was nearly gone. Blackstone tells us: "One shall hardly hear at present of an action of debt brought upon a simple contract," but of assumpsit for damages, where there could be no wager of law: and so of trover instead of detinue. "In the room of actions of account a bill in equity is usually filed. . . . So that wager of law is quite out of use; . . . but still it is not out of force. And therefore when a new statute inflicts a penalty and gives . . . debt for recovering it, it is usual to add 'in which no wager of law shall be allowed;' otherwise an hardy delinquent might escape any penalty of the law by swearing that he had never incurred or else had discharged it." [1]

The ancient trial was, then, by this time, well nigh its end. The validity of it, indeed, was recognized by the Court of Common Pleas in 1805; [2] but in 1824, when for the last time it makes its appearance in our reports,[3] it is a discredited stranger, ill understood: "Debt on simple contract. Defendant pleaded *nil debet per legem*. . . . Langslow applied to the court to assign the number of compurgators. . . . The books [he says] leave it doubtful. . . . This species of defence is not often heard of now. . . . Abbott, C. J. The court will not give the defendant any assistance in this matter. He must bring such number of compurgators as he shall be advised are sufficient. . . . Rule refused. The defendant [say the reporters] prepared to bring eleven compurgators, but the plaintiff abandoned the action." It turned out then that it was not yet quite a ghost; and so in 1833 (Stat. 3 & 4 Will. IV. c. 42 s. 13) it was at last enacted by Parliament "that no wager of law shall be hereafter allowed."

V. *The Ordeal.* — Of trial by the ordeal (other than the duel) not much need be said. Nothing is older; and it flourishes still in various parts of the world. As the investigations of scholars

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[1] Com. iii. 347–8. This clause had been usual in English statutes for a century or two, and it appeared also on this side of the water, in our colonial acts, even in regions like Massachusetts, where it is said that wager of law was not practised. Dane's Ab. i. c. 29, art. 8. In Childress *v.* Emory, 8 Wheat. 642, 675 (1823), Story, J., is of opinion that "the wager of law, if it ever had a legal existence in the United States, is now completely abolished."

[2] Barry *v.* Robinson, 1 B. & P. (N. R.), p. 297: "If a man," argued counsel, "were now to tender his wager of law, the court would refuse to allow it." . . . "This was denied by the court," adds the reporter.

[3] King *v.* Williams, 2 B. & C. 538.

discover it everywhere among barbarous people, the conclusion seems just that it is indigenous with the human creature in the earlier stages of his development.[1] Like the rest, our ancestors had it. Glanville, for instance, our earliest text-book (about 1187),[2] lays it down that an accused person who is disabled by mayhem *tenetur se purgare. . . . per Dei judicium. . . . scilicet per callidum ferrum si fuerit homo liber, per aquam si fuerit rusticus.* This was found to be a convenient last resort, not only when the accused was old or disabled from fighting in the duel, but when compurgators or witnesses could not be found or were contradictory, or for any reason no decision could otherwise be reached.[3]

The earliest instance of the ordeal in our printed judicial records occurs in 1198–9,[4] on an appeal of death, by a maimed person, where two of the defendants are adjudged to purge themselves by the hot iron. But within twenty years or so this mode of trial came to a sudden end in England, through the powerful agency of the Church, — an event which was the more remarkable because Henry II., in the Assize of Clarendon (1166) and again in that of Northampton (1176), providing a public mode of accusation in the case of the larger crimes, had fixed the ordeal as the mode of trial. The old form of trial by oath was no longer recognized in such cases in the king's courts. It was the stranger, therefore, that such quick operation should have been allowed in England to the decree, in November, 1215, of the Fourth Lateran Council at Rome. That this was recognized and accepted within about three years (1218–19) by the English crown is shown by the well-known writs of Henry III. to the judges, dealing with the puzzling question of what to do for a mode of trial, *cum prohibitum sit per Ecclesiam Romanam judicium ignis et aquae.*[5] I find no case of trial by ordeal in our printed records later than Trinity

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[1] Patetta, Ordalie, c. I. [2] Book xiv., c. i.

[3] It is worth remarking that civilization has not yet developed a satisfactory substitute for these tests of the barbarians, in cases where there is merely strong and persistent ground for suspicion; in such a case, for example, as a well-known instance of the drowning of a young woman at a leading summer resort (Bar Harbor) in 1887. In earlier days the ordeal would have been the trial there.

[4] Rot. Cur. Reg I. 204.

[5] Sacros. Conc. xiii. ch. 18, pp. 954–5. Rymer's Foedera (old ed.) 228, ib. (Rec. Com. ed.) 154, has one of these writs. Maitland quotes it in his Gloucester Pleas, p. xxxviii.

Term of the 15 John (1213).[1] We read then of these cases. One Ralph, accused of larceny, is adjudged to purge himself by water; he did clear himself, and abjured the realm. And so in another exactly like case of murder.[2] It was the hard order of the Assize of Clarendon that he who had come safely through the ordeal might thus be required to abjure the realm, a circumstance which recalls the shrewd scepticism of William Rufus when he remarked of the judicium Dei that God should no longer decide in these matters, — he would do it himself.[3] In the third case a person was charged with supplying the knife with which a homicide was committed, and was adjudged to purge himself by water of consenting to the act. He failed, and was hanged.

In England, then, this mode of trial lived about a century and a half after the Conquest, going out after Glanville wrote, and before Bracton. The latter is silent about it.

VI. *Trial by Battle.* — This is often classified as an ordeal, "a God's judgment." But in dealing with our law it is convenient to discriminate these, for the battle has certainly other aspects than merely that of an appeal to heaven. Moreover, it survived the ordeal proper for centuries. It had, also, no such universal vogue. Although it existed among almost all the Germanic people, the Anglo-Saxons seem not to have had it; but it came into England with the Normans in full strength. In Glanville, a century after the Conquest, we see it as one of the chief modes of trial in the

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[1] Plac. Ab. 90, col. 2. Two of these cases are given in Seld. Soc. Pub. i., case 116, where also there follow three others, 119, 122, and 125, "of uncertain date."

[2] Patetta, Ordalie, 312, doubts the accepted opinion that the disappearance of the ordeal in England was thus due to the Lateran Council decree. He remarks, truly, that the action of the Council merely forbade ecclesiastics to take part in the ordeal, and adds that there is mention of the ordeal in Henry the Third's Magna Carta of 1224-5. But one is inclined to doubt whether Dr. Patetta had in mind the king's writs above referred to; those and the sudden cessation of the cases seem conclusive. As regards the mention of *legem manifestam* as late as the Magna Carta of 1224-5, it may, perhaps, be explained by the circumstance that this was a reissue of an earlier document. The mere *legem* of the former documents had already become *legem manifestam nec adjuramentum*, in the second reissue, of 1217. The phrase was also used for the battle as well as the ordeal in its narrower sense — the sense now under consideration. See Brunner's interesting comment on this passage of Magna Carta in Zeits. der Sav.-Stift. (Germ. Abt.) ii. 213. There occurs a reference to the ordeal in a record of 1221, but on examination it proves to be a statement that one Robert underwent the ordeal at a previous trial, which may well have been some years earlier. Maitland's Gloucester Pleas, case 383, and p. xxii; and notes on this case at p. 150, and on case 434, at p. 151.

[3] Cited by Brunner, Schw. 182.

king's courts: "A debt . . . is proved by the court's general mode of proof, viz., by writing or by duel."[1] "They may come to the duel or other such usual proof as is ordinarily received in the courts," etc.[2] Of the inferior courts, also, we are told that in a lord's court a duel may be reached between lord and man, if any of the man's peers makes himself a witness and so champion.[3] He, also, who gave the judgment of an inferior court might, on a charge of false judgment, have to defend the award in the king's court by the duel, either in person or by a champion.[4]

There is sufficient evidence that it was, at first, a novel and hated thing in England. In the so-called "Laws of William the Conqueror," it figures as being the Frenchman's mode of trial, and not the Englishman's. In a generation after the Conquest, the charter of Henry I. to the city of London grants exemption from it; and the same exemption was widely sought and granted, *e.g.*, in the cases of Winchester and Lincoln.[5] The earliest reference to the battle, I believe, in any account of a trial in England, is at the end of the case of Bishop Wulfstan *v.* Abbot Walter, in 1077.[6] The controversy was settled, and we read: "Thereof there are lawful witnesses . . . who said and heard this, ready to prove it by oath and battle." This is an allusion to a common practice in the Middle Ages, that of challenging an adversary's witness,[7] or perhaps to one method of disposing of cases where witnesses were allowed on opposite sides and contradicted each other. Brunner[8] refers to this, with Norman instances of the dates 1035, 1053, and 1080, as illustrating a procedure which dated back to the capitulary of 819, mentioned above at p. 52. Thus, as among nations still, so then in the popular courts and between contending private parties, the battle was often the *ultima ratio*, in cases where their rude and unrational methods of trial yielded no results. It was mainly in order to displace this dangerous, costly, and discredited mode of proof that the recognitions — that is to say, the first organized form of the jury — were introduced.

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[1] Lib. 10, c. 17.
[2] Lib. 13, c. 11.
[3] Lib. 9, c. 1.
[4] Lib. 8, c. 9.
[5] Mon. Gild. Lond. i. 128, s. 5, and Thorpe, i. 502 — *quod nullus eorum faciat bellum.* Pike, Hist. Crim. Law, i. 448; Patetta, Ordalie, 307, 308.
[6] Essays in Anglo-Saxon Law, 379; s. c. Big. Plac. Ang. Norm. 19; Brunner, Schw. 197, 400–1.
[7] Lea, Sup. and Force, 3d ed., 111.
[8] Schw. 197–8; ib. 68, 401, citing Glanville, lib. 10, c. 12; lib. 2, c. 21.

These were regarded as a special boon to the poor man, who was oppressed in many ways by the duel.[1] It was by enactment of Henry II. that this reform was brought about, first in his Norman dominions (in 1150–52), before reaching the English throne, and afterwards in England, sometime after he became king, in 1154. Brunner (to whom we are indebted for the clear proof of this) remarks upon a certain peculiar facility with which the jury made head in England, owing, among other reasons, to the facts (1) that the duel was a hated and burdensome Norman importation, and (2) that among the Anglo-Saxons, owing to the absence of the duel, the ordeal had an uncommonly wide extension, so that when, a generation later than the date of Glanville's treatise, the ordeal was abolished, there was left an unusually wide gap to be filled by this new, welcome, and swiftly developing mode of trial.[2] The manner in which Glanville speaks of the great assize is very remarkable. In the midst of the dry details of his treatise we come suddenly upon a passage full of sentiment, which testifies to the powerful contemporaneous impression made by the first introduction of the organized jury into England.[3]

Selden has remarked upon the small number of battles recorded as actually fought.[4] The publications of the society which bears his honored name is now bringing to light cases of which he

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[1] For instance, we are told that "Saint Louis abolished battle in his country because it happened often that when there was a contention between a poor man and a rich man in which trial by battle was necessary, the rich man paid so much that all the champions were on his side and the poor man could find none to help him." Grandes Chroniques de France, publiées par M. Paulin, Paris, vol. 4, p. 427, 430, al. 3. Cited in Brunner Schw. 297, note.

[2] Schw. 397.

[3] Glanville, lib. 2, c. 7. This well-known passage runs in substance thus: The Grand Assize is a royal favor, granted to the people by the goodness of the king, with the advice of the nobles. It so cares for the lives and estates of men that every one may keep his lawful right and yet avoid the doubtful chance of the duel, and escape that last penalty, an unexpected and untimely death, or, at least, the shame of enduring infamy in uttering the hateful and shameful word ["Craven"] which sounds so basely in the mouth of the conquered. This institution springs from the greatest equity. Justice, which, after delays many and long, is scarcely ever found in the duel, is more easily and quickly reached by this proceeding. The assize does not allow so many essoins as the duel; thus labor is saved and the expense of the poor reduced. Moreover, by as much as the testimony of several credible witnesses outweighs in courts that of a single one, so much does this process rest on greater equity than the duel. For while the duel goes upon the testimony of one sworn person, this institution requires the oaths of at least twelve lawful men.

[4] Duello, cc. 8 and 13.

probably never heard.[1] Such traces of the duel in England as are found before Glanville's time are collected in Bigelow's Placita Anglo Normannica. Very early cases from Doomsday Book, compiled by William within twenty years of the Conquest, are found here.[2] Selden[3] refers to a civil case in Mich. 6 Rich. I. (1194), as "the oldest case I have read of." This may be the case in Vol. I. of the Rotuli Curiae Regis, 23–24, 26, which appears to be the earliest one reported in the judicial records. Although the demandant here *hoc offert probare versus eum per Radulphum filium Stephani, qui hoc offert probare ut de visu patris sui per corpus suum sicut curia consideraverit*, and the defendant came and defended the right and inheriting of (the plaintiff), *et visum patris Radulphi filii Stephani, per Johannem . . . qui hoc offert defendere per corpus suum consideracione curiae*, — yet the case appears to have gone off without the battle on another point. But this record shows the theory of the thing. The plaintiff offers battle and puts forward a champion who is a complaint-witness, and who speaks as of his personal knowledge or, as in this case, on that of his father,[4] and stands ready to fight for his testimony. Before the battle the two champions swear to the truth of what they say.

In the mother-country, Normandy, one might hire his champion; but in England, theoretically, it was not allowed. In 1220 one Elias Piggun was convicted of being a hired champion, and lost his foot.[5] What was thus forbidden seems, however, to have been much practised, and finally, in 1275, the struggle to prevent it came to an end by abandoning any requirement that the champion be a witness. The St. West. I., c. 41, reads: "Since it seldom happens that the demandant's champion is not forsworn in making oath that he or his father saw the seisin of his lord or ancestor and

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[1] If the lawyers knew how much they could promote the cause of legal learning, and thereby improve our law, by becoming members of this excellent society (it costs a guinea a year), they would not neglect the opportunity. The American Secretary is Professor Keener, of the Columbia Law School, in the city of New York.

[2] pp. 41, 42, 43, 61, 305.

[3] Duello, c. 13.

[4] Glanville, lib. 2, c. 3, sets forth that in this class of cases the plaintiff cannot be his own champion, for he must have a good witness, who shall speak of his own knowledge or that of his father. So in the recognition, substituted for the battle, the jurymen — the twelve witnesses of Glanville's eulogy, so much better than the one battle-witness — are to speak of their own personal knowledge, or by the report of their fathers, *et per talia quibus fidem teneantur habere ut propriis*. Ib., lib. 2, c. 17.

[5] Seld. Soc. Pub. i. 192; s. c. Bracton, 151 b.

his father commanded him to *deraign*, it is provided that the demandant's champion be not bound to swear this; but be the oath kept in all other points."

The Year Books indicate that trial by battle was not much resorted to. One sign of it is the particularity with which the ceremonial is described, as if it were a curiosity. Thus in 1342–3, and again in 1407,[1] in criminal appeals, the formalities of the battle oath and subsequent matters are fully given. And in 1422[2] the ceremony in a battle between champions is described with curious details, down to the defaulting of the tenant on the appointed day. In 1565 Sir Thomas Smith[3] tells us, of this mode of trial, that it was not much used, but "I could not learn that it was ever abrogated." This was only six years before the famous writ of right, in Lowe *v.* Paramour,[4] which furbished up this faded learning. Dyer has a pretty full and good account of that case; but Spelman's Latin[5] is fuller and very quaint. The trial in a writ of right, he tells us, repeating with precision the doctrine of four centuries and a half before, is by duel or the assize; utrunque genus hodie insuetum est sed duelli magis.[6] Yet, he goes on, it chanced that this last was revived in 1571, and battle was ordered, *non sine, magna juris consultorum perturbatione.* Then comes a curious detailed account, setting forth, among other things, how Nailer, the demandant's champion, in his battle array, to the sound of fifes and trumpets, on the morning of the day fixed for the battle, *Londinum minaciter spatiatur.* It has been said that Spelman was present at Tothill Fields on that day with the thousands of spectators that assembled; he does not say so, I believe, but he writes with the vivacity of an eye-witness. The plaintiff did not appear. Another like case occurred as late as 1638,[7] but there was no fight. Efforts to abolish the judicial battle were made through that century and the next, but without result. At last came the famous appeal of murder in 1819,[8] in which the learning of the subject

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[1] Y. B. 17 Ed. III. 2, 6; s. c. Lib. Ass. 48, 1; Y. B. 9 H. IV. 3, 16.

[2] Y. B. 1 H. VI. 6, 29.

[3] Com. England, bk. ii. c. 8.

[4] Dyer, 301.

[5] Glossary, *sub voc.* Campus, A. D. 1625.

[6] How rusty the lawyers were in 1554, as regards the Grand Assize, is shown in Lord Windsor *v.* St. John, Dyer, 98 and 103 b.

[7] Cro. Car. 522; Rushworth's Coll. ii. 788.

[8] Ashford *v.* Thornton, 1 B. & Ald. 405.

was fully discussed by the King's Bench, and battle was adjudged to be still "the constitutional mode of trial" in this sort of case. As in an Irish case in 1815,[1] so here, to the amazement of mankind, the defendant escaped by means of this rusty weapon. And now at last, in June, 1819, came the abolition of a long-lived relic of barbarism, which had survived in England when it had vanished everywhere else in Christendom.[2]

The Grand Assize, also, that venerable original form of the jury which Henry II. established, with its cumbrous pomp of choosing for jurymen knights "girt with swords"[3] went out at the end of 1834, with the abolition of real actions.

We have now traced the decay of these great mediæval modes of trial in England. What, meantime, had been happening to the jury? That is a question to be answered hereafter.

James B. Thayer.

CAMBRIDGE, May 1891.

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[1] Neilson, Trial by Combat, 330.

[2] Stat. 59 Geo. III. c. 46, — reciting that "appeals of murder, treason, felony, and other offences, and the manner of proceeding therein, have been found to be oppressive; and the trial by battle in any suit is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished." The statute went on to enact that all such appeals "shall cease, determine, and become void and . . . utterly abolished, [and that] in any writ of right now depending or hereafter to be brought, the tenant shall not be received to wage battle, nor shall issue be joined or trial be had by battle in any writ of right."

[3] Lord Windsor *v.* St. John, Dyer, 103 b.